

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN BROADCASTING
COMPANIES, INC., DISNEY ENTERPRISES,
INC., CBS BROADCASTING, INC., CBS
STUDIOS INC., NBCUNIVERSAL MEDIA,
LLC, NBC STUDIOS, LLC, UNIVERSAL
NETWORK TELEVISION, LLC,
TELEMUNDO NETWORK GROUP LLC, and
WNJU-TV BROADCASTING LLC,

Plaintiffs/Counterclaim Defendants,
v.

AEREO, INC.

Defendant/Counterclaim Plaintiff.

Civil Action No. 12-CV-1540 (AJN)

WNET, THIRTEEN, FOX TELEVISION
STATIONS, INC., TWENTIETH CENTURY
FOX FILM CORPORATION, WPIX, INC.,
UNIVISION TELEVISION GROUP, INC.,
THE UNIVISION NETWORK LIMITED
PARTNERSHIP, and PUBLIC
BROADCASTING SERVICE,

Plaintiffs/Counterclaim Defendants,
v.

AEREO, INC.

Defendant/Counterclaim Plaintiff.

Civil Action No. 12-CV-1543 (AJN)

DEFENDANT AEREO, INC.'S STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Rule 56.1 (“Aereo” or “Defendant”) submits the following Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment, with page or paragraph references to supporting documents.

I. The Aereo Technology

1. Members of Aereo can use and control an individual remotely-located antenna and a remote digital video recorder (“DVR”) to access and record over-the-air television broadcasts available in their geographic market and watch their recordings at their own convenience on a personal, Internet-connected device, such as a television, smartphone or tablet. *ABC v. Aereo, Inc.*, 874 F. Supp. 2d 373, 376-77 (S.D.N.Y. 2012) (Exh. 1)¹ (“*Aereo I*”); *WNET, Thirteen v. Aereo, Inc.*, Nos. 12–2786–cv, 12–2807–cv, 2013 WL 1285591, at *1 (2d Cir. Apr. 1, 2013) (Exh. 2) (“*Aereo II*”); Exh. 3 (Kanojia Decl.) at ¶ 5. Similarly, at home, a consumer can capture over-the-air broadcast television via an antenna (including a computer-compatible dongle antenna); make copies of that programming on a computer, VCR, or DVR; and view their recorded content via the Internet on an Internet-connected device such as a television, smartphone, or tablet. Exh. 6 (5/31/2012 Tr.) at 306:13-308:25 (Horowitz Testimony).²

II. Copies in the Aereo System are Unique and Accessible Only to the Consumer who Made Them

2. Members can use the Aereo technology to make individual copies of local over-the-air broadcasts. Exh. 7 (Aereo Technical Description) at AEREO0000981; Exh. 8 (Horowitz Expert Report) at ¶¶ 55, 57, 63, 79; Exh. 4 (Lipowski Decl.) at ¶ 5; Exh. 5 (5/30/2012 Tr.) at 104:23-105:1, 105:17-106:24 (Kelly Testimony).

3. An Aereo member can press “Watch” or “Record” to record and watch a program that is currently airing, or she can press “Record” to record a program that is scheduled to air in the future. By selecting “Watch” or “Record” in the Aereo system, an Aereo user makes a unique,

¹ “Exh. ___” refers to exhibits to the declaration of R. David Hosp filed in support of Aereo’s Motion for Summary Judgment.

² This can be accomplished by using a dongle antenna in connection with a computer and uploading the recorded program to the Internet for later retrieval. Exh. 8 (Horowitz Expert Rep.) at ¶ 76. If a DVR is used, this can be done using, for example, a Slingbox. Exh. 6 (5/31/2012 Tr.) at 306:13-308:25 (Horowitz Testimony).

separate, and individually identifiable fixed copy of their selected program. This copy of the program is associated with and accessible to only that one user who made it. *Aereo I* at 378-79, 386; *Aereo II* at *1, *9, *11; Exh. 5 (5/30/2012 Tr.) at 104:23-105:1, 105:17-114:17 (Kelly Testimony); Exh. 8 (Horowitz Expert Report) at ¶¶ 56, 57, 61, 63, 64, 79; Exh. 4 (Lipowski Decl.) at ¶¶ 6 n.1, 39-43, 47, 53, 54, 56; Exh. 9 (Kelly Dep.) at 103:8-17, 123:16-124:21; Exh. 10 (Kelly Decl.) at ¶¶ 42-43; Exh. 3 (Kanojia Decl.) at ¶ 29, 30, 34.

4. The user always makes a recording to hard disk DVR storage before any playback by the user occurs and the playback is from that recording.³ *Aereo I* at 386; Exh. 6 (5/31/2012 Tr.) at 292:1-9, 298:11-300:5 (Horowitz Testimony); Exh. 11 (Horowitz Decl.) at ¶ 19; Exh. 8 (Horowitz Expert Report) at ¶¶ 56-57, 64 and Fig. 11; Exh. 9 (Kelly Dep.) at 109:23-110:21, 123:10-124:21, 134:20-135:1; Exh. 4 (Lipowski Decl.) at ¶¶ 50-52, 56.

5. Each transmission of video in the Aereo system is initiated by a user, who plays back her previously-recorded unique copy. A user controls recording and playback of their individual program via his or her web browser on a computer or other personal device. The user does not receive or playback their recordings in the form of a “download” that is saved locally to the user’s computer or device. Instead, the user transmits her own unique recording stored on her

³ The fact that live content is first recorded by the consumer with their Aereo DVR is similar to the function of any other DVR. The recording enables pause and rewind functionality. Further, unlike a typical DVR, the fact that each user makes a copy in connection with the “Watch” mode is disclosed in the Aereo member Frequently Asked Questions and also on the user interface. See Exh. 16 (Aereo FAQ) at “What Happens when I Tune to a Live Program,” “Why is there a Slight Delay when I Start Watching” (last accessed May 14, 2013) (“When using Aereo’s LIVE PLAY mode, you make and view a recording of the program that you select and watch that recording.”); Exh. 3 (Kanojia Decl.) at ¶¶ 40-41; Exh. 5 (5/30/2012 Tr.) at 139:21-140:5 (Kanojia Testimony). In “Watch” mode, the user’s unique copy of a program is recorded to a hard drive associated solely with that user, and is maintained for as long as the user continues to watch the recording (including up to two hours after the program concludes if the member pauses the program and takes no further action). That copy may also be maintained for a longer span of time if the user chooses to save the recording for future viewing as he or she is watching the program. *Aereo I* at 377, 378, 392; *Aereo II* at *2, *22 n. 15; Exh. 8 (Horowitz Expert Rep.) at 64. In “Record” mode, the user’s unique copy of a program is recorded to a hard drive and saved until the user chooses to delete it, or until her DVR runs out of space. *Aereo I* at 377, 378, 392; *Aereo II* at *2; Exh. 8 (Horowitz Expert Rep.) at 64; Exh. 4 (Lipowski Decl.) at ¶¶ 6, n. 1, 53.

remote DVR located at Aereo. In both “Watch” and “Record” modes, the user may start watching her recording at any time after the recording has begun, and the user can pause, rewind, or fast-forward her recording. *Aereo I* at 377, 378, 387; *Aereo II* at *1, *2, *22, n.15; Exh. 4 (Lipowski Decl.) at ¶¶ 45-52; Exh. 6 (5/31/2012 Tr.) at 292:1-294:16 (Horowitz Testimony).⁴

III. All Recordings in the Aereo System are Made by the Consumer, Not Aereo

6. The Aereo system functions automatically without any intervening action by any Aereo employee in response to consumer requests. With respect to accessing, copying, and viewing over-the-air broadcast programming, the Aereo system functions automatically, and only in response to the individual user’s actions. It is the user, not Aereo, who makes a unique copy by pressing “watch” or “record” which copy is available only to the person who made it. It is the user, not Aereo, who transmits such individual copy to herself for playback in the “Record” or “Watch” mode. Nothing is copied unless initiated by a user. Nothing is transmitted until requested by a user. *Aereo II* at *11; Exh. 5 (5/30/2012 Tr.) at 134:25-135:3, 214:7-14 (Kanojia Testimony); Exh. 8 (Horowitz Expert Report) at ¶ 54 n.40; Exh. 3 (Kanojia Decl.) at ¶ 29; Exh. 4 (Lipowski Decl.) at ¶¶ 12, 14, 35-37; Exh. 9 (Kelly Dep.) at 133-34.

7. Copies are only made by the user using the Aereo system when she supplies the command by pressing “Watch” or “Record” to tune an antenna to a specific broadcast channel and to make a copy of her specific selected program. *Aereo II* at *9, *11; Exh. 5 (5/30/2012 Tr.) at 106:25-114:17 (Kelly Testimony); Exh. 6 (5/31/2012 Tr.) at 292:1-294:16 (Horowitz

⁴ The fixed copy saved by the Aereo member to her remote hard drive using either the “Watch” mode or the “Record” mode is physically and functionally different from the RAM memory “buffer” used to facilitate streaming over the Internet. That buffer contains only a small packet of data consisting of a small portion of the program being streamed that is used solely to facilitate the streaming. The buffer retains this small packet of data only for as long as is necessary to transmit that small portion of the program, after which the contents of the buffer are replaced with new packets of data to be sent to the user. *Aereo I* at 378, 392; *Aereo II* at *11; Exh. 5 (5/30/2012 Tr.) at 107:5-114:17 (Kelly Testimony); Exh. 6 (5/31/2012 Tr.) at 309:16-314:4 (Horowitz Testimony); Exh. 4 (Lipowski Decl.) at ¶ 53; Exh. 10 (Kelly Decl.) at ¶¶ 52-53.

Testimony); Exh. 8 (Horowitz Expert Report) at ¶¶ 57, 63, 64, 79; Exh. 9 (Kelly Dep.) at 103:8-17, 123:16-124:21; Exh. 10 (Kelly Decl.) at ¶¶ 42-43; Exh. 3 (Kanojia Decl.) at ¶ 32; Exh. 4 (Lipowski Decl.) at ¶¶ 36-42.

8. The member chooses what programs to record. The Aereo system merely allows users to access the over the air programming that Plaintiffs (and other over-the-air broadcasters) have made available to the public, to make individual copies of their selected programs via their remote DVR, and to play those copies back to themselves. *Aereo II* at *11; Exh. 3 (Kanojia Decl.) at ¶ 29; Exh. 5 (5/30/2012 Tr.) at 124:21-24 (Kanojia Testimony).

IV. Members Have The Right To Access Over-The-Air Signals using an Antenna and to Record and Watch Plaintiffs' Programming

A. Members Access Over-The-Air Signals Using Individual Antennas

9. An Aereo member is automatically assigned an antenna pair (one VHF and one UHF) at the inception of their selected recordings, whether in “watch or “record” mode. Each Aereo member uses an individual Aereo antenna (also referred to generally as the “antenna”) with respect to each recording using the Aereo system, and that individual’s antenna only ingests the signal for the single channel selected by the user. *Aereo I* at 381; *Aereo II* at *1, *3; Exh. 6 (5/31/2012 Tr.) at 326:2-6 (Horowitz Testimony); Exh. 11 (Horowitz Decl.) at ¶¶ 54-55; Exh. 14 (Pozar Decl.) at ¶¶ 9, 15-16; Exh. 4 (Lipowski Decl.) at ¶¶ 36, 64-65; Exh. 13 (Volakis Dep. 5/12/2012) 201:12-202:8.

10. Each Aereo antenna pair can be used and controlled by only one user at any given time, and each antenna captures only the signal tuned by that user. *Aereo I* at 378; *Aereo II* at *3; Exh. 5 (5/30/2012 Tr.) at 104:23-105:1, 105:17-105:25 (Kelly Testimony); Exh. 11 (Horowitz Decl.) at ¶¶ 17, 18, 22; Exh. 8 (Horowitz Expert Report) at ¶¶ 56, 64, 79, 81; Exh. 4 (Lipowski

Decl.) at ¶¶ 27, 36-37; Exh. 9 (Kelly Dep.) at 76:12-21, 77:10-17; Exh. 13 (Volakis Dep. 5/12/2012) at 201:21-23.⁵

11. Each antenna pair is connected to its own tuner and feed line. Exh. 8 (Horowitz Expert Rep.) at ¶ 59; Exh. 13 (Volakis Dep. 5/12/2012) at 201:12-23. At any given time, a single Aereo antenna on an antenna board may be tuned to one channel and another antenna on that board may be tuned to another channel. *Id.* at 201:21-202:8.

12. A user tunes her individually-assigned antenna by pressing either “Watch” or “Record,” which automatically causes the antenna to activate at the time of the scheduled recording (whether it is at the time of her instruction or in the future), and tune to the desired channel. That same action by the user causes her remote DVR to record a unique copy of the program to a hard drive, which recording is accessible only by that user. *Aereo I* at 5-6, 23, 37; *Aereo II* at *12; Exh. 4 (Lipowski Decl.) at ¶¶ 5, 50; Exh. 8 (Horowitz Expert Rep.) at ¶¶ 56, 64; Exh. 6 (5/31/2012 Tr.) at 297:12-298:10 (Horowitz Testimony); Exh. 5 (5/30/2012 Tr.) at 102:21-103:7 (Kelly Testimony).

13. Whether in “Watch” or “Record” mode, the user-specific recording made by the user is made solely from the signal received by the specific antenna assigned to that user. *Aereo I* at 378, 386-87; *Aereo II* at *2, *3; Exh. 5 (5/30/2012 Tr.) at 104:20-106:24, 137:1-7, 139:12-1; Exh. 4 (Lipowski Decl.) at ¶¶ 43, 56.

14. The signal generated from an individual antenna tuned by a user (whether in “Watch” or “Record” mode) is unique and will have variations in signal attributes different from the

⁵ Each individual antenna within the Aereo system only receives a broadcast signal when it is automatically activated and tuned in response to a user’s instruction to “Watch” or “Record.” Exh. 8 (Horowitz Expert Report) at ¶ 64; Exh. 14 (Pozar Decl.) at ¶¶ 13-14; Exh. 4 (Lipowski Decl.) at ¶¶ 35, 37, 65. When an individual antenna is not being used by a user, that antenna receives no broadcast signal. Exh. 6 (5/31/2012 Tr.) at 295:5-18 (Horowitz Testimony); Exh. 4 (Lipowski Decl.) at ¶¶ 14, 36, 65; Exh. 14 (Pozar Decl.) at ¶ 11 & n.3; Exh. 9 (Kelly Dep.) at 76:12-21, 77:10-17; Exh. 5 (5/30/2012 Tr.) at 241:6-242:13 (Lipowski Testimony).

signals recorded from another antenna element. Exh. 6 (5/31/2012 Tr.) at 328:19-24 (Horowitz Testimony); Exh. 5 (5/30/2012 Tr.) at 106:11-24 (Kelly Testimony); Exh. 4 (Lipowski Decl.) at ¶ 37; Exh. 9 (Kelly Dep.) at 78:15-24. The copies that the user makes to her hard drive storage (whether in “Watch” or “Record” mode) are unique copies that have their own individual attributes, glitches, and artifacts. *Aereo I* at 380-81; Exh. 6 (5/31/2012 Tr.) at 300:16-304:14 (Horowitz Testimony); Exh. 5 (5/30/2012 Tr.) at 106:11-24 (Kelly Testimony); Exh. 4 (Lipowski Decl.) at ¶ 43; Exh. 8 (Horowitz Expert Report) at ¶ 55, n. 42; Exh. 9 (Kelly Dep.) at 141:19-142:9.

B. Members Access Local Over-The-Air Signals For Their Own Non-Commercial Use

15. Aereo permits only individuals to become members of Aereo and to use the Aereo technology to make and watch recordings. Aereo does not offer its technology to commercial entities and Aereo’s Terms of Use do not allow for the use of its technology for any commercial purpose. *See, e.g.*, Exh. 15 (Aereo Terms of Use, available at <https://aereo.com/terms> (last accessed May 9, 2013)), “Right to Use Aereo Equipment and Platform” ¶ 5; Exh. 3 (Kanojia Decl.) at ¶¶ 5, 29.

16. Aereo limits the playback of over-the-air broadcasts to members located within the geographic area—currently only the New York City area⁶—served by those over-the-air signals. The Aereo Terms of Use, which users must accept as part of using the Aereo system, limits playback only to those physically present in the home market area. *See* Exh. 15 (Aereo Terms of Use, available at <https://aereo.com/terms> (last accessed May 9, 2013)) “Right to Use Aereo Equipment and Platform” ¶ 2. Further, [REDACTED]

⁶ Aereo is currently expanding to Boston and will make its technology available to consumers in Boston in May 2013.

[REDACTED]

17. Consumers use the Aereo system to access over-the-air television signals and to record and view the programs carried on those signals. The fact that the Aereo technology is located remotely, versus in the consumer's home, and accordingly, consumers use and control the Aereo technology via the Internet is not material. Nor is it material that over-the-air signals are converted for receipt over the Internet. Indeed, all television transmission and reception involves the conversion of over-the-air broadcast signals into a format that is viewable by the user, for instance, on a television display. Exh. 6 (5/31/2012 Tr.) at 285:8-286:9 (Horowitz Testimony); Exh. 12 (Horowitz PowerPoint Slides). Likewise, all recordings of any type change the received television signal into a different form and medium, whether the recording is analog or digital. The VCR allows a user to record programming carried on over-the-air signals to

magnetic tapes and DVRs allow a user to make digital recordings on to hard drives. *Aereo I* at 377; *Aereo II* at *22, n. 15; Exh. 6 (5/31/2012 Tr.) at 286:10-288:15; 290:11-291:10, 298:16-23, 305:9-306:12 (Horowitz Testimony); Exh. 12 (Horowitz PowerPoint Slides).

Dated: May 14, 2013

Respectfully submitted,

AEREO, INC.

By its attorneys,

/s/ R. David Hosp

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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2013, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.


Kathryn Lugo